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No. 82-1253

In The

Supreme Court of the United States

October Term, 1983

HERMAN SOLEM, *et al.*,

Petitioners,

vs.

JOHN BARTLETT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT

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QUESTION PRESENTED

Did the Act of May 29, 1908, 35 Stat. 460, implicitly terminate federal Indian jurisdiction over the portion of the Cheyenne River Sioux Reservation that the Act opened to settlement?

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STATEMENT OF THE CASE

John Bartlett, respondent here and habeas corpus petitioner in the District Court, pleaded guilty to a South Dakota State charge of attempted rape on May 2, 1979. He was sentenced to ten years in the State Penitentiary at Sioux Falls, where he is now held. The events leading to the charge occurred at Eagle Butte, South Dakota, and the particular tract of land where these events occurred was owned by a non-Indian at the time of the offense. *See* State's Br. 3. Eagle Butte is in the part of the Cheyenne River Sioux Indian Reservation opened to non-Indian settlement by the Act of May 29, 1908, 35 Stat. 460. Bartlett is a member of the Cheyenne River Sioux Tribe, as is the complaining witness in his case.

In 1981 Bartlett sought habeas corpus relief from a state court, and relief was denied. No appeal was taken, and he then sought habeas corpus from the Federal District Court. These habeas corpus petitions were filed *pro se*, and neither court appointed counsel for Bartlett. The petitions asserted that the state courts lacked jurisdiction over Bartlett because his alleged offense had occurred in Indian country as defined by 18 U. S. C. § 1151. The Federal District Court granted the petition without trying any issues of fact. Following prior decisions of the Eighth Circuit Court of Appeals, the court held that the locus in quo was within the Cheyenne River Indian Reservation, so that the State had no jurisdiction. Pet. A1-A8.

The State appealed to the Eighth Circuit Court of Appeals, and Bartlett obtained legal counsel for the first time. Bartlett's counsel moved the court to adopt a portion of the record in *United States v. Dupris*, 612 F. 2d

319 (8th Cir. 1979), *vacated as moot*, 446 U. S. 980.[1] Counsel for local counties as amici curiae supporting the State lodged a lengthy appendix to their brief. Portions of the latter are appended to their brief in this Court.

The State sought and obtained in banc review by the Court of Appeals. After oral argument, the full court affirmed the District Court's holding that Eagle Butte remains within the Cheyenne River Reservation by a vote of 5 to 2. 691 F. 2d 420 (8th Cir. 1982).

Neither court below reached an alternative basis for habeas corpus within the scope of Bartlett's *pro se* petition, namely, whether Eagle Butte, the place of the offense, was a dependent Indian community within the meaning of 18 U. S. C. § 1151(b).

The issue here is whether the 1908 Act of Congress opening part of the Cheyenne River Indian Reservation terminated the reservation status of the area opened. The area in question is in western South Dakota all of which was reserved to the Sioux by the Treaty of June 29, 1868, 15 Stat. 635. The Act of March 2, 1889, 25 Stat. 888, ratified an agreement with the Sioux ceding much of the land reserved in 1868 but reserving six separate reservations including the Cheyenne River and Standing Rock Reservations. The Act of May 29, 1908, 35 Stat. 460, opened a portion of the surplus tribal lands in the western part of both reservations to settlement by homesteaders. The opened portion of the Cheyenne River Reservation includes Eagle Butte.

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[1]The *Dupris* record materials were added to the record in this case. The principal item is a report on the Cheyenne River Reservation by Professor Frederick E. Hoxie of the Newberry Library in Chicago. There are also 115 appendices to his report, comprising copies of archival records of the Reservation. Professor Hoxie was retained by the United States as an expert in connection with United States v. Dupris, *supra*.

The 1908 Act had its genesis in bills introduced by Senator Gamble and Representative Hall of South Dakota on December 9 and 24, 1907. S. 1385 and H. R. 17884, 60th Cong., 1st Sess. The Secretary of the Interior dispatched Inspector James McLaughlin to the Reservations to explain the bills to the tribes. On March 16, 1908, Inspector McLaughlin met with 63 members of the Cheyenne River Tribe. McLaughlin discussed the bills with those in attendance, a low number owing to bad weather. State's Br. A-48. No agreement was reached, and a tribal leader present, James Crow Feather, asked for additional time. McLaughlin agreed provided that a written report of the tribe's wishes reached him in Washington by the 28th. He did not receive a report by that time and filed his report on March 30. The Senate Committee reported out its bill two days later (April 1) and the Senate passed it on April 15. The House passed the bill on May 26, and it was signed by the President on May 29. State's Br. A-16.

The 1909 Presidential Proclamation officially opening the reservations described the lands to be opened as "all the nonmineral, unallotted, unreserved land within the Cheyenne River and Standing Rock Indian Reservations." Proclamation of August 19, 1909, 36 Stat. 2500.[2]

The 1908 Act was amended by the Act of February 17, 1910, 36 Stat. 196. Surplus tribal lands in the eastern part of the Standing Rock Reservation were opened to settlement by the Act of February 14, 1913, 37 Stat. 675. *See United States v. Long Elk*, 565 F. 2d 1032 (8th Cir. 1977). Both statutes were repeatedly amended thereafter to postpone the time provided for payment to the Indians

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[2]Professor Hoxie, *supra* note 1, determined that when the reservation was opened 55% of the tribe held allotments in the opened area. Hoxie Report *supra* at 38.

by the settlers. Unsold lands from both openings were temporarily reserved in 1934 and restored to tribal ownership between 1941 and 1967 by orders of the Secretary of the Interior authorized by 25 U. S. C. § 463.[3]

Eagle Butte is the capital and seat of government of the Cheyenne River Sioux Tribe, the location of the tribal court and jail. It is the location of the Bureau of Indian Affairs Agency for the Cheyenne River Tribe and of the Indian Health Service Hospital serving the reservation. Its population according to the 1980 census is 78.5% Indian,[4] and it includes much federal Indian land, necessitating the State's exacting showing of the particular tract where this case arose.

According to the 1980 U. S. Census, 65.6% of the resident Cheyenne River Sioux Indians live in the opened part of the Reservation, 34.4% live in the part not opened. The total census population of the opened part is about half Indian and half non-Indian.[5]

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[3]See Orders of June 12, 1941, 6 Fed. Reg. 3300; January 10, 1949, 14 Fed. Reg. 471; January 21, 1952, 22 Fed. Reg. 3693; December 13, 1965, 30 Fed. Reg. 15588; October 9, 1967, 32 Fed. Reg. 14276.

[4]U. S. Census Enumerated Districts, South Dakota Nos. A1812-14, A1822-27. *See* U. S. Census Bureau, 1980 Census Summary Tape File 1-A (South Dakota). These figures include non-Indian employees of the Bureau of Indian Affairs headquarters at Eagle Butte.

[5]U. S. Census Enumerated Districts, South Dakota, Nos. N009A-N0018, N10801A-N1830A, A0001-A0013B, A1800-A1838. *See* U. S. Census Bureau, 1980 Census Summary Tape File 1-A (South Dakota) and 1980 Final Census Enumerated District Maps (South Dakota). These figures do not take into account the probable undercounting of Indians. Indeed, the Attorney General of South Dakota admitted in his oral argument to the Court of Appeals that the opened part of Cheyenne River has an Indian majority.

SUMMARY OF ARGUMENT

Neither the Act of May 29, 1908, nor its legislative history makes any reference to reservation boundaries or to jurisdiction over the area opened. Hence, the State must try to meet its burden to show clear intent of Congress to terminate the opened area by inference and implication. The burden has not been met.

The Act's terms and legislative history describe a land sale transaction, nothing more. Its title and operative language are nearly identical to those held by the Court not to terminate in *Mattz v. Arnett*, 412 U. S. 481 (1973) and *Seymour v. Superintendent*, 368 U. S. 351 (1962) and are very different from the reservation areas held terminated in *Rosebud Sioux Tribe v. Kneip*, 430 U. S. 584 (1977) and *DeCoteau v. District County Court*, 420 U. S. 425 (1975). Other terms of the 1908 Act reserve all tribal mineral land, and land needed for agency, school, and religious purposes, in the opened area, showing the intent to continue significant tribal interest and activity in that area.

The State's effort to give the Court's *Rosebud* decision controlling force here is inconsistent with the Court's express caution in that case against a search for "absolutes". 430 U. S. at 588, n. 4. Also, there are basic differences in language, history, and circumstances between the two cases. The 1904 Rosebud act was "crucial" to the Court's decision. *Id.* In that case the tribe had formally agreed to a complete cession of all interest in its Gregory County lands. By contrast there was no agreement with the Cheyenne River Sioux Tribe, only a hastily arranged discussion of the proposed act with a small part of the tribe.

Despite the absence of an agreement, Congress expressly said it was carrying out what it thought were the Indians' wishes. This makes especially important the complete absence of any warning to the Indians or consent by them to the imposition of discriminatory State criminal jurisdiction over tribal members in the opened area. State jurisdiction would have been a very serious matter to the Indians in 1908, owing to the manifest hostility of State laws and institutions toward Indians at that time. For this reason, the rule that ambiguous statutes should be construed in favor the Indians should be strictly applied in this case.

The Act's provisions claimed by the State to meet its burden do not show the requisite intent of Congress. The phrase "reservation thus diminished" in context and common usage at the time referred to the tribes' diminished common land on the reservation, not to boundaries or jurisdiction. The Court of Appeals so concluded. *United States ex rel. Condon v. Erickson*, 478 F. 2d 684, 687 (8th Cir. 1973). The liquor amendment added in 1910 was one of numerous identical amendments added to most tribal opening laws between 1909-1920, many of which applied to intact reservations. These provisions were a reaction to the contemporary rule of this Court that defined "Indian country" for liquor control purposes based on land, title, not on reservation boundaries. *See Clairmont v. United States*, 225 U. S. 551 (1912). The State's reliance on the school lands provision is refuted by its legislative history.

Subsequent governmental treatment of the reservation, while not uniform, generally reflects the understanding that the 1908 Act did not terminate the area opened. Notably, the Interior Department first proposed in 1912 to move the Agency headquarters to Eagle Butte in the

opened area and eventually carried out the proposal in 1954. Also, the tribal court and police have exercised jurisdiction over the opened area continuously since 1908. The State's claim that the state and federal courts have recognized termination will not withstand analysis. Remarkably, no reported state prosecution of an Indian defendant exists before 1963, and during much of the relevant period, a state statute has asserted concurrent jurisdiction over reservations in the State making assertions of State jurisdiction ambiguous.

ARGUMENT

I. THE ACT OF MAY 29, 1908 PROVIDED FOR THE SALE OF TRIBAL LANDS TO NON-INDIAN-SETTLERS IN LANGUAGE AND UNDER CIRCUMSTANCES THAT REFLECT A CONGRESSIONAL INTENT TO LEAVE THE RESERVATION BOUNDARIES INTACT.

Neither the 1908 Act nor its legislative history makes any reference to jurisdiction or reservation boundaries. As a result, the State must attempt to demonstrate an intent on Congress' part to alter the reservation boundaries by inference and implication. *See Rosebud Sioux Tribe v. Kneip*, 430 U. S. 584, 586-87 (1977). Intent to disestablish cannot be inferred from the mere change in title. Reservation status is not dependent upon any property interest in the particular lands held by the Tribe. See 18 U. S. C. § 1151(a); *Mescalero Apache Tribe v. Jones*, 411 U. S. 145 (1973). Nor can intent be found in the federal policy reflected in the allotment and surplus land acts. To be sure, those acts contemplated the eventual termination of reservations, but the reservations were not terminated by immediate operation of the acts themselves:

> The [Dawes Act, 24 Stat. 388] permitted the President to make allotments of reservation lands to resi-

> dent Indians and, with tribal consent, to sell surplus lands. Its policy was to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing. When all the lands had been allotted and the trust expired, the reservation could be abolished. Unallotted lands were made available to non-Indians with the purpose, in part, of promoting interaction between the races and of encouraging Indians to adopt white ways.

Mattz v. Arnett, 412 U. S. 481, 496 (1973); *see also Seymour v. Superintendent*, 368 U. S. 351, 356 (1962).[6]

Rather, a particularized examination of the act in question, its legislative history, and surrounding circumstances is required to ascertain Congress' intent. *Rosebud*, 430 U. S. at 586; *Mattz*, 412 U. S. at 504-05. Unless that examination reveals an intent on Congress' part to separate certain tracts from the reservation, all tracts remain a part of it. *Seymour v. Superintendent*, 368 U. S. at 359. Since doubtful expressions in all such cases must be resolved in favor of the Indian people, the State must demonstrate by clear evidence congressional intent to disestablish the western portion of the reservation. *Rose-*

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[6]By 1908, Congress had determined that the assimilation timetable set out in the allotment act should be slowed and had taken steps to extend federal jurisdiction beyond that originally provided. In 1897, for instance, Congress expressly applied the Indian country liquor prohibition to Indian allotments. Act of Jan. 30, 1897, 29 Stat. 506. In 1906, Congress gave the President discretionary authority to extend the trust period of allotments in all cases. Act of June 21, 1906, 34 Stat. 325, 327 (codified at 25 U. S. C. § 391). See F. Cohen's Handbook of Federal Indian Law (1982 ed.) 613 n. 16. Most significantly, Congress also directed in 1906 that the extension of state civil and criminal jurisdiction over Indian allottees shall be delayed until the expiration of the trust period. Act of May 8, 1906, 34 Stat. 182 (codified at 25 U. S. C. § 349). These modifications of the allotment scheme show that by 1908 Congress was even less disposed to terminate reservation status immediately than it had been in 1887.

bud, 430 U. S. at 586-87; *DeCoteau v. District County Court*, 420 U. S. 425, 444 (1975).

In *Rosebud*, the Court cautioned that the search for "absolutes" in these cases "misapprehends the nature of our inquiry . . ." and that the relevant factors tend to vary from case to case. 430 U. S. at 588 n. 4, 598 n. 20. For example, the fact that Congress had referred to the Colville Indian Reservation as the "former Colville Indian Reservation" was not enough to show that the reservation had been disestablished. *Seymour v. Superintendent*, 368 U. S. at 356 n. 12. The relevant factors here, although not identical to those found elsewhere, do not show clear intent on Congress' part to disestablish the western portion of the Cheyenne River Reservation.[7] The legislative history and statutory language show, to the contrary, congressional intent to conclude a real estate transaction, nothing more.

A. The Legislative History and Language of the 1908 Act Show Congressional Intent to Arrange a Sale of Real Property Only.

The history of the 1908 Cheyenne River Act began, not with a cession agreement between the United States and the tribe, but with the introduction of a bill on December 9, 1907, by Senator Gamble of South Dakota. The bill, numbered S. 1385, was entitled, "A bill to authorize the sale and disposition of a portion of the surplus and unalloted lands in the Cheyenne River and Standing Rock reservations, in the States of South Dakota and North Dakota, and making appropriation and provision to carry the

[7]The State purports to apply the Court's general standard to the language, history and circumstances of the 1908 Act, but in fact seeks to wrap itself entirely in the *Rosebud* precedent. State's Br. 19-25. For that reason, its analysis is inconsistent with the very authority relied upon. Worse, the State mischaracterizes certain circumstances of the Cheyenne River Act and ignores others in its effort to conform the act to *Rosebud*. See, e. g., discussion, part B 1 below.

same into effect." The bill provided only for the sale of tribal lands to homesteaders and made no mention of jurisdiction over the opened lands or modification of reservation boundaries. *See generally*, State's Br. A-123 through A-128.

The bill was forwarded to the Secretary of the Interior, and he hastily dispatched Inspector McLaughlin to the two reservations to explain the bill to the tribes involved.[8] On March 16, 1908, Inspector McLaughlin met with a few members of the Cheyenne River Tribe for that purpose.[9] No agreement was reached with the tribe. *See* discussion below, part B 1. The Senate bill was reported out of committee on April 1 and, after minor modifications were made to accommodate the House, the bill passed the Senate on April 15, passed the House on May 26, and was signed by the President on May 29.

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[8]The Secretary's comments on the bill and Inspector McLaughlin's report were included in both the House and Senate reports on the bill, which are essentially the same. *See* S. Rep., No. 439, 60th Cong., 1st Sess. (1908); H. Rep. No. 1539, 60th Cong., 1st Sess. (1908). References herein to those reports will be to the appendix of the State's brief where possible; it contains the House report in its entirety.

[9]The State's brief asserts that Inspector McLaughlin met with "the Cheyenne River counsel." State's Br. 41. Assuming the State intended "council," the assertion is false. The Inspector met with a random group of Indians who could be summoned on short notice. Ironically, the meeting did not comport with the procedures for handling tribal business imposed by the Bureau of Indian Affairs. James Crow Feather complained, " . . . we have a way of doing business in matters of this kind, which you [McLaughlin] first started. It is our business council which you showed us how to do business by, on this reservation. You told us, when any business came up in regard to the lands for all of us to get together, have a chairman, and do it like the white people; that a general council of the Indians should just express their opinion regarding the matter, and they turn it over to the business council to act upon." State's Br. A-137-38. No business council meeting took place respecting the planned opening.

The terse legislative history is more remarkable for what is missing than for what is present. Absent from the consideration of the bill is any discussion of, indeed, any reference, to jurisdictional consequences of the proposed land sale.[10] There is no mention of withdrawal of protective federal jurisdiction from or state criminal jurisdiction over tribal members—presumably points of great interest given the contemporary attitude of South Dakota toward Indian people. *See* discussion below, part B 1. Instead the debate focused exclusively on traditional property-related issues—the money to be paid for lands purchased directly by the United States and the method selected for appraising the land. *See* House debate of May 26, 1908, 42 Cong. Rec. 7003-07.

The wording of the 1908 act reflects the same intent as events leading to its passage—the consummation of a real estate sale. The statute is titled, "An act to authorize the *sale and disposition of a portion of the surplus and unallotted lands in the Cheyenne River* and Standing Rock Indian reservations in the States of South Dakota and North Dakota, and making appropriation and provision to carry the same into effect." (emphasis added) Its operative language directed the Secretary of the Interior to "sell and dispose" of nonmineral, unallotted tribal land in the portion opened. The lands were to be disposed of under the homestead and townsite laws, and provisions were made for fixing the price to be paid. 35 Stat. 460, §§ 1-2.

The title and the operative language of the Cheyenne River act are virtually identical to that of the 1892 Kla-

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[10]The excerpts from the March 16 meeting between some tribal members and McLaughlin quoted in the State's brief relate to the land transaction itself. See State's Br., 42-43—where McLaughlin emphasized the excess of land owned by the tribe. *See also* discussion below, part B 2.

math act considered by the Court in *Mattz v. Arnett, supra,* and to the 1906 Colville act considered in *Seymour v. Superintendent, supra.* *See* Act of June 17, 1892, 27 Stat. 52; Act of March 22, 1906, 34 Stat. 80. In *Mattz* and *Seymour,* the Court determined that those statutes did not terminate the affected reservations:

> The Act did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards.

Seymour, 368 U.S. at 356; *quoted in Mattz,* 412 U.S. at 497. There is no reason in law or history why the identical language in the 1908 Cheyenne River Act should be construed to have a different effect.[11]

In those respects, the language of all three acts stands in sharp contrast to those considered in *Rosebud Sioux Tribe v. Kneip, supra,* and *DeCoteau v. District County Court, supra.* In *DeCoteau,* the operative language of the cession agreement read, "The Sisseton and Wahpeton bands of Dakota Sioux Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands

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[11]The State stresses the pressure of "familiar forces" on Sioux lands generally. *See* State's Br. 27-31. There is no evidence, however, that such pressure was brought to bear on the Cheyenne River Reservation. These lands were less fertile than those on other reservations and there was no great clamor by local non-Indians to open Cheyenne River. Instead, state "boosters" hoped to attract settlers to that part of the state by opening the reservation. *See generally* Hoxie, *supra* no. 1, at 46-49. Beyond the inaccuracy of its historical facts, there is nothing in the State's discussion suggesting that the would-be settlers were interested in anything more than title to Indian land. The alleged presence of "familiar forces", then, does not justify a construction of the Cheyenne River Act different from that of the Klamath and Colville Act.

. . ." Act of March 3, 1891, 26 Stat. 1036.[12] In the case of *Rosebud*, the 1904 Act also incorporated a voluntary cession by the tribe and was entitled, "An act to ratify and amend an agreement with the Sioux Tribe of Indians of the Rosebud Reservation, in South Dakota, and making appropriation and provision to carry the same into effect." The act's operative sentence was virtually identical to that of *DeCoteau*. Act of April 23, 1904, 33 Stat. 254. The Court viewed the operative language of those acts as "precisely suited" to the purpose of reservation termination and, primarily for that reason, held that the affected lands had been terminated. *Rosebud*, 430 U. S. at 592; *DeCoteau*, 420 U. S. at 445.

The respective presidential proclamations that opened the Cheyenne River and Rosebud Reservations also reflect this critical difference in language. The Proclamation opening the Rosebud Reservation declared that by agreement, "the said tribe ceded, conveyed, transferred, relinquished, and surrendered, forever and absolutely, without any reservation whatsoever, expressed or implied . . . all their claim, title, and interest of every kind and character . . . ." *Rosebud*, 430 U. S. at 602. The Cheyenne River Proclamation simply opened to settlement and entry "all the nonmineral, unallotted, unreserved lands within the Cheyenne River and Standing Rock Indian Reservations. . . ." Proclamation of Aug. 19, 1909, 36 Stat. 2500. The Secretary of the Interior implemented the proclamation by an order that referred to opening "the classified lands within" the two reservations. 38 Interior Dec. 160 (1909). As a result, the Cheyenne River Proclamation

[12]The Sisseton and Wahpeton agreement was ratified as part of the annual appropriations act for the Indian Department and, as a result, does not have a separate title. *See* Act of March 3, 1891, 26 Stat. 989, 1036.

does not reflect an understanding by the Executive Branch that the opening act altered the reservation boundary. *See Rosebud, supra,* at 602-03.

There are other indications in the Cheyenne River Act beyond its title and operative sentence that Congress intended to leave the reservation boundaries intact. Section one of the act authorized the Secretary of the Interior to reserve for the tribe's benefit lands in the opened area needed for agency, school, and religious purposes. State's Br. A-4. Section three of the act directed the Secretary to reserve mineral lands in the opened area "until further action by Congress." State's Br. A-6.[13] Those sections not only reflect the essentially proprietary nature of the act, but obviously contemplate a continuing tribal interest in the opened area and suggest ongoing activity usually associated with Indian reservations. Thus, Congress—faithful to its stated intention in the title and operative language of the act—arranged for the sale of certain tribal lands, nothing more. *Seymour v. Superintendent,* 368 U. S. at 355.

B. The Cheyenne River Act Is Unlike Those Considered in Rosebud in Circumstances and Intent.

The State overlooks the critical difference in language between the Cheyenne River Act and the 1904 Rosebud Act and focuses instead on superficial similarities between the Cheyenne River Act and the two later Rosebud Acts of 1907 and 1910, also held to have disestablished the affected lands. *See* State's Br. 19-24. Those similarities, however, reveal nothing of Congress' intent

[13]Even though the statute did not expressly so provide, Congress understood section three to require that mineral lands in the opened portion of the reservation "shall be held in trust for the Indians." Remarks of Mr. Sherman, May 26, 1908, 42 Cong. Rec. 7003. See also the 1909 Presidential Proclamation, opening only "nonmineral" lands to settlement. 36 Stat. 2500.

in the Cheyenne River Act because of the unique statutory context of the Rosebud Acts.

The *Rosebud* Court, aware of differences between the 1904 and later Rosebud Acts, indicated that it viewed the language and intent of the 1904 act as "crucial" to its inquiry. *Rosebud,* 430 U. S. at 588 n. 4, 606 n. 30. All parties in that case agreed that the two later acts simply carried forward the intent of the 1904 act, and disputed only the meaning of the 1904 Act. *Rosebud,* 430 U. S. at 606. The later acts were, as a result, construed as part of a broader statutory context in *Rosebud* and as continuing the established policy, undertaken with the Rosebud Tribe's consent, of constricting the reservation boundaries through land cession agreements. *Rosebud,* 430 U. S. at 606-15.[14]

Taken out of that statutory context, the later Rosebud acts teach little about the meaning of the Cheyenne River Act, notwithstanding apparent similarities. In the particulars singled out by the State, the dissimilarities between the Cheyenne River Act and the Rosebud act are manifest.

1. Absence of an agreement.

According to the State, Inspector McLaughlin negotiated the sale and disposition of the Cheyenne River lands at Congress' behest, and the resulting agreement was essentially identical in purpose to the Rosebud agreement, also negotiated by McLaughlin, which disestablished the affected Rosebud lands. State's Br. 31-36, 38-48.

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[14]Secondary evidence relating to the latter acts was cited by the Court as also indicative of "the continuing intent to disestablish the affected areas first manifested in the 1901 Agreement." *Rosebud,* 430 U. S. at 613. There is no reason to believe that those secondary factors would have been considered sufficient evidence of intent to disestablish absent the clear intent to do so expressed in the agreements and the 1904 act.

However, the parallels found by the State exist only because of its distortion of both the Cheyenne River and Rosebud negotiations.

There was in no sense, actual or practical, a negotiated agreement between the Cheyenne River Tribe and McLaughlin. There had been no prior council meetings or other discussions with the Cheyenne River Tribe before 1908 respecting the sale of surplus lands, much less a formal agreement. In fact, the 1908 act had been in the legislative works for some months before McLaughlin met with the tribe "for the purpose of obtaining definite knowledge as to their wishes." State's Br. A-30. The brief meeting took place on March 16, 1908, and was attended by sixty-three members of the tribe.[15]

At the March 16 meeting, McLaughlin explained the terms of the opening bill to the tribal members in attendance, but they did not consent or agree to the planned opening. James Crow Feather, chairman of the tribal business council, concluded the matter for the Indians with,

> I understood you to say in your talk to us today that you did not want to rush us, and anything done in a hurry is never done right. I could have got up here and expressed my opinion in this matter, but what I want is to have all the tribe agree upon one thing.

State's Br. A-161. McLaughlin himself understood that the matter had not been concluded and agreed to hold open his report for 12 days so that the tribe could respond. *Id.* On the fourteenth day following the meeting,

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[15]The Indian population at Cheyenne River was placed at 2,557 in 1904. *See* 1 Kappler *Indian Affairs—Laws and Treaties,* 1030 (1904), *cited in* United States ex rel. v. Erickson, 478 F. 2d 264, 686, n. 4 (8th Cir. 1973). These 63 were a random group of those available, not a representative body of leaders.

McLaughlin made his report to the Indian service without having received the tribe's response:

> Crowfeather, president of the Indian council requested that I defer submitting my report of the Cheyenne River Reservation for a few days in order that the Indians of the entire reservation might be enabled to assemble at some point for conference regarding the matter, and that they would forward me a paper reporting the result of such conference, which would reach me at Washington on or before Saturday, the 28th instant, but up to the present time I have not received the same, and have therefore concluded to submit my report as herein set forth.

State's Br. A-50, 51. Six weeks later Congress passed the Act.

Although these events and the absence of an agreement with the Cheyen e River Tribe appear plainly on the face of McLaughlin's report to Congress, the South Dakota sponsor of the 1908 act stated in committee reports that an agreement had been reached with the tribe. *See* S. Rep. No. 439, 60th Cong. 1st Sess. 4 (1908). These self-serving statements alone, however, cannot create an agreement where none exists. *United States v. Dupris*, 612 F. 2d at 337, (dissenting opinion).

The McLaughlin negotiations at Rosebud were much more significant and successful than those at Cheyenne River. In 1901, Inspector McLaughlin concluded an actual written agreement with the Rosebud Tribe, signed as required by prior treaty by three-fourths of the adult male population, by which the tribe agreed to "cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation. . . ." *Rosebud*, 430 U.S. at 590 n. 8. The 1901 Agreement was not ratified by Congress, and McLaughlin was asked to negotiate a second

agreement with the tribe with somewhat different payment terms. The second agreement was obtained and as had the first, contained language "precisely suited" to disestablishment, but was signed by a majority rather than extraordinary majority of the tribe. *Rosebud*, 430 U. S. at 593-94. In 1904, Congress passed the first of the three Rosebud acts, and the act incorporated the entire text of both Agreements. *Rosebud*, 430 U. S. at 556. Those agreements provided an . . . "unmistakable baseline purpose of disestablishment." *Rosebud, supra* at 592.[16] Because of the absence of any agreement containing disestablishment language here, there is no such baseline purpose of disestablishment against which to construe the 1908 act. *Rosebud, supra* at 591.

The absence of an agreement also indicates that the Cheyenne River people, unlike the Rosebud people, were given no warning of and certainly did not consent to the application of state law over the affected area—a serious matter at the time. South Dakota law in 1908 (and for many years afterward) expressly prohibited Indians from voting or holding office. Rev. C. S. Dak. (1903), Civ. C. § 26. Jury service was limited to persons qualified to vote, so Indians were excluded from juries. *Id.* Pol. C. § 708. State law at the time even made it a crime for any "person" to "harbor or keep on or about his place of abode within any organized county of the state, any Indian or Indians, who have not adopted the manners and habits

[16]The tribe in *Rosebud* objected to reliance on the 1903 agreement as a voluntary cession since it lacked the requisite extraordinary majority of tribal members' signatures. The Court observed, however, that Congress was aware at the time that it could unilaterally disestablish the affected reservation lands, *Rosebud*, 430 U. S. at 598. The 1903 agreement, then, need not have been an effective cession under the terms of the treaty, but it did show majority consent of the tribe.

of civilized life." *Id.* Pen. C. § 766. Had the 1908 act disestablished the western portion of the reservation, the roughly one-half of the tribal members living on that part of the reservation would have been immediately subjected to the criminal jurisdiction of a hostile government whose juries by law excluded Indian people.[17] Those consequences are all the more reason why the withdrawal of protective federal jurisdiction from an unsuspecting people cannot be lightly inferred. *United States v. Sandoval*, 231 U. S. 28, 40 (1913); *United States v. Kagama*, 118 U. S. 375, 384 (1886):

> These Indian Tribes are the wards of the Nation . . . they owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies.

The State understandably ignores the basic difference between the McLaughlin negotiations with the Rosebud Tribe, which produced actual cession agreements, and the hurried discussions with Cheyenne River members which produced nothing at all. With that difference restored,

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[17]The sponsors of the 1908 act described the act to their colleagues as conforming to the Indians' wishes as expressed at the McLaughlin meeting and as consistent with their interest, notwithstanding the absence of an agreement or, in the case of Cheyenne River, any informal response to the proposed opening. *See* State's Br. A-29. At a minimum, Congress should be held to its word in that respect and the 1908 act construed consistently with the Cheyenne River Tribe's reasonable expectation under the circumstances that protective federal jurisdiction would continue. *See* Jones v. Meehan, 175 U. S. 1, 11 (1899); ". . . it must always . . . be borne in mind . . . that the treaty is drawn up by [the United States] and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States."

the other parallels between the two situations are superficial only--that the same person "negotiated" with the two tribes, and the same Senator introduced the two bills. Those two circumstances mean only that the two reservations are in the same state and that Inspector McLaughlin was considered a reliable employee of the Indian service at the time—nothing more.[18] Particularly in light of the serious consequences, the State cannot demonstrate a clear intent to disestablish the opened lands from these insignificant and ambiguous circumstances.

2. The "reservation thus diminished."

Citing *Rosebud*, the State claims to find evidence of intent to disestablish the opened Cheyenne River lands from the proviso in section 2 of the Act referring to the "reservation thus diminished." State's Br. 19-20. Again, the different statutory context of the phrase indicates a different meaning for the phrase here. As the Court of Appeals determined, the term in the 1908 Act referred to the tribes' diminished common land on the reservation, not diminished reservation boundaries. *United States ex rel. Condon v. Erickson*, 478 F. 2d at 687, cited favorably by the Court in *Mattz v. Arnett*, 412 U. S. at 505 n. 23, for its general analysis of the disestablishment issue.

The primary, and we think sole, purpose of the act was to accomplish a real estate sale. The transcript of the McLaughlin meeting, for instance, shows that the individ-

[18]Inspector McLaughlin's visit with 63 members of the Cheyenne River Tribe and his negotiated agreements with the Rosebud Sioux were only two of many meetings of every sort that he had with Indians all over the West. See his autobiography, J. McLaughlin, My Friend the Indian (1910). This book reveals his personal belief that all federal protection should be immediately withdrawn from Indians, but his personal views are not an appropriate basis to construe an Act of Congress.

uals present focused on the amount of land to be sold to homesteaders, which reservation lands were to be opened, the price to be paid for those lands, and how much land would remain for tribal use and allotment. The natural meaning of diminished in that general context is reduced land ownership. *Id.*

Even more so than the term's use by McLaughlin, the phrase "diminished reservation" as used in the congressional committee reports undeniably reflected a proprietary meaning. According to those reports, "The *lands reserved for the use of the Indians upon both reservations is diminished,* in the opinion of your committee and of the Department, are ample and more than sufficient for the present and future needs of the Indians of the respective tribes." State's Br. A-18. (emphasis added.) In that sentence, the adjective diminished is unquestionably used to describe the lands left to the tribe—including mineral and other lands in the opened area—not the reservation boundaries.

The phrase was similarly used in the act to distinguish the land retained by the tribe from that opened for sale to homesteaders. In section two, Congress authorized individual allottees in the area to be opened to exchange their allotment for one within the "reservations thus diminished. . . ."[19] Again, the term referred to retained common

[19]That Congress authorized an individual to exchange his allotment in the opened portion of the reservation for one in the closed portion does not indicate disestablishment of the opened area. Congress presumably realized that some individual tribal members would be disinclined to participate in the Dawes Act social engineering scheme and simply provided that those individuals may relocate. In other words, that provision should be viewed as part of the gradual assimilation plan, in the absence of a baseline purpose of disestablishment. *Rosebud,* 430 U. S. at 613-14. The provision would also please the South Dakota sponsors of the Act by potentially increasing the acreage open to homesteaders.

lands where allotments could be taken and suggests nothing in that context about reservation boundaries or jurisdiction. It is evident, in fact from later usage that the term was commonly understood at the time to mean diminished common land, while the reservation boundaries were unchange. *See, e. g.*, discussion below of Interior records and maps which show the opened area as within the reservation boundaries and also denominate the closed area as the diminished part or portion of the reservation, part II B.

That meaning of "diminished reservation" is further supported by contemporary jurisdictional arrangements. Had a member of Congress paused to reflect on the jurisdictional implications during his consideration of the bill, he would have realized that federal criminal jurisdiction over tribal Indians—the jurisdiction that affect the Indians the most—depended on reservation boundaries rather than land ownership.[20] *See* discussion below, part II B. A member of Congress conscious of jurisdictional issues, then, would not have expected that the "diminishment" of land owned by the tribe would necessarily terminate the reservation status of the affected lands.

3. Liquor amendment.

The State argues that the 1910 liquor amendment to the 1908 Act shows that the reservation status of the opened lands had been terminated in 1908. State's Br. 22-23. This claim will not withstand analysis.

The first problem with the State's argument is shown by the wording of 1910 amendment. It provided (State's Br. A-94-95):

> That the lands allotted, those retained or reserved, and the surplus lands sold, set aside for townsite pur-

[20] At least by 1909, Congress realized that the rule was different for liquor regulation. See discussion below, part B 3.

> poses, or granted to the said States, or otherwise disposed of under the provisions of this act, shall be subject for a period of twenty-five years to the laws of the United States prohibiting the introduction of intoxicants into the Indian country.

By its terms, this provision was not confined to the opened portion of the reservations but applied as well to the parts not opened. The express reference to the lands "retained or reserved" confirms this meaning. Yet the State's argument depends on the contrary proposition.

The 1910 liquor provision for Cheyenne River and Standing Rock was the third in a series of nearly identical provisions applied to most openings and sales of tribal lands from 1909 through 1920.[21] Many of these provisions applied to reservations or parts of reservations long assumed, or actually held by courts, not to be disestablished or reduced by the respective opening statutes. For example, from the prior footnote, see the statute for the Yakima Reservation, compare *Washington v. Yakima Indian Nation*, 439 U. S. 463 (1979) (reservation assumed to exist); the statutes for the Colville Reservation, compare *Seymour v. Superintendent, supra* (reservation held not

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[21]See Act of March 3, 1909, 35 Stat. 795, § 21 (Flathead Res., Mont.); *id.*, § 17 (Ft. Peck Res., Mont.); Act of Feb. 17, 1910, 36 Stat. 196, § 8 (Cheyenne River and Standing Rock); Act of May 6, 1910, 36 Stat. 348, § 11 (Yakima Res., Wash.); Act of May 13, 1910, 36 Stat. 368, § 5 (Siletz Res., Ore.); Act of May 27, 1910, 36 Stat. 440, § 10 (Pine Ridge Res., S. Dak.); Act of May 30, 1910, 36 Stat. 448, § 10 (Rosebud Res., S. Dak.); Act of June 1, 1910, 36 Stat. 455, § 13 (Ft. Berthold Res., N. Dak.); Act of May 11, 1912, 37 Stat. 111, § 2 (Omaha Res., Neb.); Act of July 22, 1912, 37 Stat. 197, § 2 (Colville Res., Wash.); Act of Feb. 14, 1913, 37 Stat. 675, § 8 (Standing Rock Res., N. & S. Dak.); Act of Aug. 31, 1916, 39 Stat. 672, § 13 (Colville Res., Wash.); Act of May 31, 1918, 40 Stat. 592, § 2 (Ft. Hall Res., Ida.); Act of June 30, 1919, 41 Stat. 17, § 10 (Blackfeet Res., Mont.); Act of June 4, 1920, 41 Stat. 751, § 9 (Crow Res., Mont.). Thereafter the practice ended, presumably because liquor had become unconstitutional everywhere in the United States.

disestablished); the statute for the Flathead Reservation, compare *Confederated Salish & Kootenai Tribes v. Namen*, 665 F. 2d 951 (9th Cir. 1982), *cert. denied*, — U. S. —, 74 L. Ed. 291, (reservation held not disestablished) and *Moe v. Confederated Salish and Kootenai Tribes*, 425 U. S. 463 (1976) (reservation assumed to exist); the statute for the Blackfeet Reservation, compare *British-American Oil Producing Co. v. Bd. of Equalization*, 299 U. S. 159 (1936) (reservation assumed to exist); the statute for the Omaha Reservation, compare *Wilson v. Omaha Indian Tribe*, 442 U. S. 653 (1979) (reservation assumed to exist); the statute for the Crow Reservation, compare *Montana v. United States*, 450 U. S. 544 (1981) (reservation assumed to exist); the statute for the Ft. Berthold Reservation, compare *City of New Town v. United States*, 454 F. 2d 121 (8th Cir. 1972) (reservation held not disestablished); the 1913 statute for the eastern part of the Standing Rock Reservation, compare *United States v. Long Elk, supra* (reservation held not disestablished). Admittedly, there are a few cases, such as *Rosebud, supra*, in which the liquor provisions were applied to an area long assumed and held by the courts to have been disestablished.

These statutes were a reaction to the contemporary rule of this Court that Indian country for liquor prohibition purposes was confined to land in original Indian title unless a statute specified otherwise. This rule was announced in *Bates v. Clark*, 95 U. S. 204 (1877). It raised a doubt even about the status of Indian allotments (arguably not in original Indian title) for liquor prohibition purposes. A particular response to the *Bates* rule was a provision in an allotment and opening agreement between the United States and the Nez Perce Indians ratified in 1894. Act of Aug. 15, 1894, 28 Stat. 326. A provision in it applied

the Indian country liquor laws to all lands of the reservation, whether ceded, allotted, or retained by the tribe, for 25 years. 28 Stat. 330 art. 9.

In 1897, Congress resolved the uncertainty over allotments by explicitly applying the liquor laws to allotments. 29 Stat. 506 (1897). In 1908, this Court sustained a conviction for violating the liquor laws on fee patented lands covered by the 1894 Nez Perce statute, *supra*. *Dick v. United States*, 208 U. S. 340 (1908). The Court sustained the special 25 year provision but in dictum renewed the rule of *Bates v. Clark* that jurisdiction otherwise depended on Indian title. *Id.* at 352.[22]

The *Bates v. Clark* rule amid the allotment and opening laws of the period raised the specter that as land went out of trust, it would cease to be subject to the Indian country liquor laws. This would occur within as well as without reservations, by direct sales to homesteaders and by allotees taking their land out of trust. *See* 25 U. S. C. § 349. To meet this threat to the integrity of the liquor laws, the Nez Perce 25 year extension provision was routinely applied after 1909. *See* footnote 21, *supra*. The legislative history of these laws makes clear that they were inspired by the *Dick* decision. *E.g.*, H. R. Doc. No. 711, 61st Cong., 2d Sess. (1910). *See generally*, Cohen, *supra*, at 31-38, 45-46.

That this fear was well founded was confirmed when the Court decided *Clairmont v. United States*, 225 U. S. 551 (1912). Clairmont had been convicted of introducing liquor into the Flathead Reservation in Montana. But he had been arrested on a railroad right-of-way within the reservation. The Court relentlessly applied the rule of

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[22]The jurisdictional rule for general criminal jurisdiction over tribal Indians was quite different. See part II C 2, below.

Bates v. Clark, held that the Indian title to the right-of-way had been extinguished so that it had ceased to be Indian country, and overturned the conviction.[23]

That Congress understood the 1909-1920 liquor provisions in relation to the rule of *Bates v. Clark, supra, Dick v. United States, supra*, and *Clairmont v. United States, supra*, is also shown by the terms of some of the statutes cited in footnote 21, *supra*. The Blackfeet, Ft. Hall, and Crow statutes expressly applied to places described as "within" the respective reservations. Congress knew that the *Bates v. Clark* rule was especially troublesome within reservation boundaries.

The State's contrary argument can be traced to a basic error. It relies on the post-1948 statutory definition of Indian country rather than the Court's contemporary definition in *Clairmont* and other cases. *See* Cohen, *supra*, at 45-46. The use by Congress in any particular case of one of these liquor provisos does not indicate with certainty that it viewed an area as within a reservation or not. But it does show Congress's recognition that the place in question would continue to be a tribal Indian community justifying application of the liquor laws. This is one major attribute of a reservation and is more consistent with continued reservation status than with termination.

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[23]The *Clairmont* Court did not mention the 25 year extension statute applied to the Flathead Reservation in 1909, n. 21, *supra*, although it would not appear to have changed the result. To add to the confusion, the Court sustained a nearly identical conviction in United States v. Soldana, 246 U. S. 530 (1918), on the ground of a technical difference in title to the right of way. These cases probably generated the explicit references to rights of way in 18 U. S. C. § 1151, enacted in 1948. *See* Cohen, *supra*, at 36.

4. School lands provision.

The State argues the provision in the 1908 Act which granted sections sixteen and thirty-six in the opened area to the states for school purposes is evidence of disestablishment. State's Br. 20. As the State points out, school land grants were made in the South Dakota Enabling Act, but were suspended for those sections located on an Indian reservation until the reservation was extinguished. However, the general practice of granting school lands in opening statutes and the specific legislation history of the Cheyenne River Act show that the school lands sections were granted in 1908 sooner than required by the enabling act, not upon termination of the reservation.

The federal statute authorizing the admission of South Dakota into the union also governed the admission of North Dakota, Montana and Washington. Act of February 22, 1889, 25 Stat. 676. Statutes opening Indian reservations in those states often have essentially the same school lands provision as the Cheyenne River Act, but have been held or assumed to have left reservation boundaries intact. *See, e.g.,* Act of June 1, 1910, 36 Stat. 455, opening Fort Berthold in North Dakota, held not to have established the reservation in *City of New Town v. United States, supra;* Act of April 23, 1904, 33 Stat. 302, opening Flathead in Montana, held not to have disestablished the reservation in *Confederated Salish and Kootenai Tribes, etc. v. Namen, supra;* Act of March 1, 1907, 34 Stat. 1035, opening the Blackfeet Reservation of Montana, assumed to exist in *British-American Oil Producing Co. v. Bd. of Equalization, supra;* Act of June 4, 1920, 41 Stat. 751, opening the Crow Reservation in Montana, assumed to exist in *Montana v. United States, supra.* The mere presence of the school lands provision in the Chey-

enne River Act, then, cannot mean that the opened lands were disestablished.

The legislative history of the Cheyenne River Act confirms that the grant was made, as in the other cases, in anticipation of the Enabling Act requirement. For instance, Congressman Sherman explained that sections sixteen and thirty-six were transferred to the states because, "The enabling act of those two states provided that the United States would *eventually* cede such sections to the States, respectively, for school purposes." 42 Cong. Rec. 7003 (1908) (emphasis added). *See also* exchange at 42 Cong. Rec. 7003-07. This suggests that Congress understood the 1908 act as advancing the time by the Enabling Act for the states to acquire the school lands.[24] Congressman Sherman's understanding also avoids the partial redundancy resulting from the State's construction, since the Enabling Act itself guaranteed the school land section to the states upon termination of the reservation. The legislative history of the provision shows it to be as consistent with the overall allotment policy of encouraging assimilation of Indians by exposure to non-Indian society as with an intent to terminate the reservation status of the opened lands. *Mattz v. Arnett*, 412 U. S. at 497; *see also, United States v. Thomas*, 151 U. S. 577 (1894), where the Court held that state school lands were part of a reservation and could coexist with federal jurisdiction over the

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[24]The legislative history of the Rosebud school lands provision was different. The Court concluded in light of that legislative history that the grant was made on the assumption that the reservation had been terminated, not in anticipation of a grant required at some point by the Enabling Act. *Rosebud*, 430 U. S. at 600.

reservation. The school lands provision, as a result, does not support the conclusion made by the State.[25]

In sum, none of the provisions discussed above has ever been held determinative of Congress' intent to disestablish a reservation. Even when the particular circumstances made some of those provisions relevant, they have been cited only as confirming the intent to disestablish found in a cession agreement and its legislative history. *See Rosebud*, 430 U. S. at 613-15; *DeCoteau*, 420 U. S. at 445 n. 33. The State has failed to demonstrate the basic purpose to disestablish in the operative language of the 1908 Act. *See* part A above. As a result, the provisions cited by the State, even were they identical to Rosebud provisions (which they are not), would be insufficient to demonstrate an unmistakable intent to disestablish the opened Cheyenne River lands. *DeCoteau*, 420 U. S. at 445.

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[25]The State also relies on the term "public domain" used in § 9 of the 1908 Act to describe some particular parcels of tribal land to be opened under the Act. The State claims this necessarily implies termination of the lands described and cites a passage in the Court's opinion in Seymour v. Superintendent, 368 U. S. 351, 358 (1962). But the contexts of the two uses of the term was very different, and the term in the 1908 Act does not carry the technical meaning.

In *Seymour*, "public domain" was used in conjunction with the word "vacated" in the operative terms of a statute dealing with an Executive Order Indian reservation. Especially in the executive order reservation context, it was reasonable to give the term its full technical meaning under public land law. But in the 1908 Act it plainly is not so used. The scheme of the Act imports some parts of the public land laws to provide for sale of the opened land. *See* §§ 2, 5. But the Act in other ways sets up its own scheme that differs from the public land laws. *E. g.*, §§ 3, 4, 6. In a different situation, this Court has expressly held that the opened land was not public domain in the technical sense. Ash Sheep Co. v. United States, 252 U. S. 159 (1920). The term in § 9 is but a shorthand reference to the lands available for sale under some of the public land laws; it cannot be made to bear any broader meaning.

Particularly in the absence of an agreement with the Cheyenne River Tribe in which it consented to the application of openly discriminatory state laws to its members, the Court should be reluctant to find intent to disestablish the opened lands by inference or implication. As this Court has observed on numerous occasions, "Doubtful expressions are to be resolved in favor of the weak and defenseless people who are wards of the nation, dependent upon its protection and good faith." *Carpenter v. Shaw*, 280 U. S. 363, 367 (1930). The circumstances here call for strict application of that "eminently sound and vital" canon of construction, *Northern Cheyenne Tribe v. Hollowbreast*, 425 U. S. 649, 655 n. 7, (1976) and a ruling that the opened Cheyenne River lands were not disestablished in 1908.

II. SUBSEQUENT TREATMENT OF THE OPENED PORTION OF THE CHEYENNE RIVER INDIAN RESERVATION CONFIRMS THAT THE 1908 ACT DID NOT TERMINATE THE OPENED AREA.

Subsequent treatment of the area in question by Congress, the Department of Interior, and the courts is significant in determining whether a reservation area has been disestablished. *Rosebud Sioux Tribe v. Kneip*, 430 U. S. at 604-05; *DeCoteau v. District County Court*, 420 U. S. at 442; *Mattz v. Arnett*, 412 U. S. at 505; *Seymour v. Superintendent*, 368 U. S. at 356-57; *United States v. Holliday*, 70 U. S. 407, 419 (1866). Particularly, the Department of Interior's actions in recognizing that the 1908 Act did not reduce the boundaries of the Cheyenne River Indian Reservation should be accorded great weight. *Northern Cheyenne Tribe v. Hollowbreast*, 425 U. S. at 660. Subsequent treatment of the opened part of the Cheyenne River Reservation, while not uniform, has mostly reflected

the assumption that the legislation did not effect the disestablishment of any part of the Reservation.

A. Subsequent Acts of Congress

A year after President Taft proclaimed the opening of the 1908 area, Congress passed the Act of June 23, 1910, 36 Stat. 602, which was entitled:

> An act to authorize the Secretary of the Interior to sell a portion of the unallotted lands *in the Cheyenne River Indian Reservation,* in South Dakota, to the Milwaukee Land Company for townsite purpose. (*emphasis added.*)

The land in question was in the area opened in 1908, and Congress described it as "in" the Reservation. The Act's legislative history also describes the land as "within", "in" or "of" the reservation. S. Rep. No. 723, 61st Cong., 2d Sess. (1910) at 1, 3; H. R. Rep. No. 1046, 61st Cong., 2d Sess. (1910).

Five years after the Act, Congress opened to non-Indian settlement the part of the Standing Rock Reservation not opened by the Act of May 29, 1908. Act of Feb. 14, 1913, 37 Stat. 675. *See United States v. Long Elk,* 565 F. 2d 1032 (8th Cir. 1977). The 1913 Act opened to non-Indian settlement the "*portion* of the Standing Rock Indian Reservation" within an area defined by a lengthy and particular metes and bounds description. Had the 1908 Act altered the Cheyenne River Indian Reservation and the Standing Rock Indian Reservation boundaries, the 1913 Congress would not have described the area to be opened as being a "portion" of the Standing Rock Reservation, since the area affected would have been the entire remaining Standing Rock Reservation. Nor would the detailed metes and bounds description have been necessary.

In 1929, a bill was introduced for the construction of a bridge across "the Moreau River at or near the White Horse Subagency on the Cheyenne River Indian Reservation . . ." H. R. 16660, 70th Cong. 2d Sess. *See* H. R. No. 2539, Feb. 15, 1929 at 1. This district was located partially in the opened portion of the reservation in T. 15 N., R. 26 E.

Under the Acts of September 30, 1950, 64 Stat. 1094, and September 3, 1954, 68 Stat. 1191, Congress authorized a taking of that land on the Cheyenne River Reservation needed to construct the Oahe Reservoir. Under the 1950 act, the Chief of the Army Corps of Engineers was authorized to negotiate for the purchase of lands "located within the taking areas of the respective reservations." 64 Stat. 1094 § 3. Under the 1954 act, Congress acquired lands necessary for construction of the Reservoir "within said Cheyenne River Indian Reservation." 68 Stat. 1191 § 1. The lands taken for the Oahe Reservoir included lands in the portion of the reservation opened by the Act of May 29, 1908. *E. g.*, 68 Stat. at 1209-16 (all land in townships 16 and 17 north is in the opened area.)

Pursuant to the act of October 17, 1975, 89 Stat. 577, federal "submarginal lands" were declared to be held in trust by the United States for a number of Indian tribes, including the Cheyenne River Sioux. Some of the lands were located within the opened portion of the Cheyenne River Reservation. Congress considered the submarginal lands in the 1908 area that were transferred to the Cheyenne River Sioux Tribe to be within the exterior boundaries of the Reservation. *See* letter of April 23, 1975, from Assistant Interior Secretary Royston Hughes to Senator Henry M. Jackson quoted in S. Rep. No. 94-377, 94th Cong., 1st Sess. at 29 (1975).

Admittedly, the subsequent legislative record is not uniformly favorable to our position. As amici counties

point out, in 1922 a statute was passed to extend (for the fourth or fifth time) the deadline for payment by homesteaders to the tribe for lands opened in 1908, and the statute used the term "former Cheyenne River and Standing Rock Indian Reservations." 42 Stat. 499 (1922). *See* Amici Counties' Br. 37. The same term was repeated in three later amendments to the 1922 act further extending the time for payment. 43 Stat. 1184 (1925); 45 Stat. 400 (1928); 46 Stat. 1107 (1931). But a payment extension statute only a year earlier had referred to "lands in the Cheyenne River Indian Reservation." 41 Stat. 1447 (1921) § 2. Also, the Interior Department orders carrying out the extensions in both years referred to the lands as "in the part of the Cheyenne River" Reservation opened by the 1908 Act. 48 Interior Dec. 80 (1921); 49 Interior Dec. 131 (1922). As the Court has recognized, such references are "not to be read as a clear indication of congressional purpose to terminate." *Mattz v. Arnett, supra,* 412 U.S. at 498. In *Mattz,* the Court was dealing with an analogous term in the opening statute itself. Here the term appears many years later.

In sum, Acts of Congress after 1908 have often indicated that the 1908 Act was not understood to deprive the encompassed area of its reservation status.

B. Subsequent Executive Branch Actions

The Presidential Proclamation officially opening the lands in 1909 described the lands to be opened as "all the nonmineral, unallotted, unreserved land within the Cheyenne River and Standing Rock Indian Reservations." Proclamation of August 19, 1909, 36 Stat. 2500. On August 21, 1909, regulations were approved by the Acting Secretary of the Interior for the opening of the Cheyenne River Reservation:

> Pursuant to the Proclamation of the President issued August 19, 1909, for the opening of the classified lands within the Cheyenne River and Standing Rock Indian reservations, the following rules and regulations are hereby prescribed. . . . 38 Interior Dec. 160 (1909).

Shortly thereafter on February 7, 1910, the Secretary of Interior wrote to President Taft:

> . . . (I)t is respectfully recommended that the date on which the Cheyenne River and Standing Rock lands are to become subject to entry under the proclamation of August 29, 1909, be extended from April 1, 1910, to May 1, 1910. . . . 40 Interior Dec. 56 (1910).

President Taft approved the recommendation the next day. Apparently both the President and the Secretary still regarded the opened lands as "Cheyenne River . . . lands" regardless of the 1908 Act.[26]

Various letters written by officials of the Bureau of Indian Affairs from 1909 to 1911 referred to the reservation lands opened for settlement as being "within the Cheyenne River Indian Reservation." Letters of January 11, 1911, from the Secretary of the Interior to Secretary of Treasury; July 29, 1910, from Acting Commissioner of Indian Affairs to Secretary of Interior; and December 14, 1909, from Chief Clerk of Bureau of Indian Affairs to P. J. Moulton. National Archives, Record Group No. 75, Central Files 1907-1939, Bureau of Indian Affairs, 58752-1410-308 and 94744-1909-305, Cheyenne River.[27]

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[26]The notice of publication required by Interior to be published in order to establish title to the lands homesteaded within the 1908 area regularly after 1908 referred to the lands as "Cheyenne River Indian lands." *See*, for example, Timber Lake Tribune, Volume 2, Number 8, July 20, 1911; Volume 2, Number 11, August 10, 1911.

[27]There can be no doubt that the non-Indians who settled in the 1908 opened portion of the reservation considered the

(Continued on next page)

In 1912, after the reservation had been opened for non-Indian settlement, Superintendent King called for the relocation of agency headquarters to the center of the reservation at Eagle Butte, South Dakota. He wrote: "Agency headquarters . . . should be moved to Eagle Butte which is a railroad point situated at about the geographical center of the reservation." 1912 Annual Report of BIA Superintendent, Hoxie Rep., *supra* n. 1, App. 64.

This proposal remained the subject of discussion for years. Charles Burke, while Commissioner of Indian Affairs, supported the reasoning in a letter:

> I don't mind saying that for administrative reasons and in the interests of economy, and close and better supervision of the Indians, there should be an administrative office at some point near the center of the

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(Continued from previous page)

area to be an Indian reservation. The Timber Lake Tribune, published at Timber Lake in the opened portion, repeatedly and continuously reflected the understanding of the residents of the opened portion that they were living on an Indian reservation. For example, there was a fight over whether the federal land office should be in Timber Lake or elsewhere. The Tribune stated that "no other town on the reservation, as far as we know, is bidding for the land office." Timber Lake Tribune, Volume 1, Number 18, September 22, 1910 (State of South Dakota Historical Resource Center, Pierre, South Dakota). A campaign "to bring the office to the reservation, where it belongs" was advertised. Volume 1, Number 17, September 29, 1910. Dewey County was publicly acknowledged to comprise the "Cheyenne River Indian Reservation." Volume 1, Number 44, April 6, 1911. Timber Lake, the Tribune claimed, was "destined to be the best town on the reservation". Volume 1, Number 44, April 6, 1911. Readers of the Tribune wrote letters to the editor evidencing their belief that in settling on the land in the open area they were residing on an Indian reservation, Volume 2, Number 9, July 27, 1911; Volume 2, Number 11, August 10, 1911. News reports of activity at Timber Lake Land Office and of Timber Lake's first anniversary leave no doubt that the opened portion of the Cheyenne River Indian Reservation was considered to be on the reservation. Volume 1, Number 51, May 18, 1911.

> reservation . . . . It is 155 miles from the agency to the farthest boundaries of the reservation . . . .

Hoxie Report at 95. Eagle Butte is indeed at the center of the Reservation in Township 12, Range 24 in the opened portion of the Reservation.

Other documents show that after 1908 the Cheyenne River Reservation continued to be administered by the BIA and the Tribe based on its 1889 boundaries. For example the four administrative districts of the reservation included the Thunder Butte District "of this reservation," a district entirely in the opened area. Hoxie Rep. App. 16 (letter of Mar. 5, 1913); Hoxie Rep. App. 31 (1928 letter referring to federal Indian school at Thunder Butte); Hoxie Rep. App. 41 (1913 letter referring to a "General Council of the Indians of this reservation held at the Thunder Butte (Sub-station.)" *See also* Hoxie Rep. App. 13 (map showing Thunder Butte District). The 1912 Annual Report of the BIA Superintendent, Hoxie Rep. App. 64, described the Reservation as "4,300 square miles" (the full 1889 Reservation) and again referring to the Thunder Butte Station.

Other documents addressed law enforcement in the opened portion. A 1911 BIA report ordered the Indian police of each district (including Thunder Butte) to go to the four towns of Timber Lake, Isabel, Eagle Butte, and Dupree to cover potential problems on the 4th of July. Hoxie Rep. App. 66 (Letter of June 30, 1911, referring to July 4th celebration). All four towns are in the opened area. *See also* Hoxie Rep. pages 100-34.

Amici counties have lodged copies of assorted documents in support of their claim that the opened part had been terminated. *See* Amici Counties' Br. 42 n. 13. But these documents include frequent references to the two parts of the reservation that show the understanding that

the reservation comprises both. For example, the 1911 Annual Report of the Superintendent, supplied as Counties' Appendix doc. no. 12, states (at Section I, page 1):

> The opening of the reservation has increased rather than diminished the necessity for Indian police in both open and diminished parts of the reservation.

Numerous other references to the two "portions" or "parts" of the reservation are in the documents. *See e. g.*, 1914 Annual Report of the Supt. at 13, Counties' Appendix doc. no. 30. Typically these references describe the unopened part as the "diminished portion" or "diminished part of the Reservation." This supports our view that the word "diminished" in the 1908 Act meant diminished in land owned by the Tribe, not in reservation jurisdiction. *See* part I B 2 above.

The Secretary of the Interior in 1935 approved the Cheyenne River Sioux Tribe's Constitution pursuant to the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, 25 U. S. C. § 476. The tribe adopted its Constitution and Bylaws at a Secretarial Election conducted pursuant to § 476. The approved Constitution and Bylaws provide that:

> The jurisdiction of the Cheyenne River Reservation Sioux Tribe of Indians shall extend to the territory within the original confines of the diminished reservation boundaries, which are described by the Act of March 2, 1889 (25 Stat. L. 888).

Constitution and Bylaws of the Cheyenne River Sioux Tribe of Indians, Article I. In approving the Constitution's definition of tribal jurisdiction over the reservation boundaries established by the 1889 legislation, the Secretary of the Interior recognized that the exterior boundaries of the Cheyenne River Indian Reservation were not reduced by the 1908 Act. Consistently and regularly from

1908 to the present time, the Cheyenne River Sioux Tribal Court, unlike the tribal officials in *Rosebud Sioux Tribe v. Kneip, supra, and DeCoteau v. District County Court, supra,* has exercised jurisdiction over its members in the 1908 area.

During the 1950's the Secretary again acted in a manner which indicated the belief that the opened area remained part of the reservation. Under the Act of Sept. 3, 1954, 68 Stat. 1191, the Secretary carried out the recommendation first made in 1912 and moved the BIA Agency headquarters to Eagle Butte in the opened area. The governing Treaty and statutes required that the tribe's federal agent "reside among them," and "reside within the Reservation." Treaty of June 29, 1868, 15 Stat. 635, art. 5; Act of February 28, 1877, 19 Stat. 254 § 7. There is no indication that the Secretary in 1954 intended to violate the treaty or statute by moving the agency off the reservation.

Amici counties argue that the 1941-1967 orders of the Secretary of the Interior restoring unsold land from the 1908 opening to the Cheyenne River Sioux Tribe were based on the assumption that the 1908 Act terminated the opened area. *See* Amici Counties' Br. at 46. The argument principally depends on the Secretary's reliance in these orders on § 7 of the Indian Reorganization Act (IRA), 25 U. S. C. § 467. This section authorizes the Secretary to add "to existing reservations" lands placed in trust for tribes under other sections of the IRA. The argument is that reliance on this section would be unnecessary if the lands were already within an existing reservation.

This argument is misplaced. Every order the Secretary has made under the IRA to restore unsold lands to any tribe has relied on both sections 3 and 7 of the

IRA. *See* 7 C. Kappler, Indian Affairs, Laws and Treaties, 1399-1601 (GPO), setting out all departmental orders between 1936-1971, many of which are IRA restorations. No such order involves any decision by the Secretary on whether any opening statute did or did not terminate the reservation status of the area opened. As the many court decisions of recent years show, any such determination by the Secretary would have been risky. Rather, the Secretary routinely included the § 7 designation in every order out of an abundance of caution.[28]

The wording of the particular restoration orders for Cheyenne River is consistent with continuing reservation status of the opened area. The orders, like the Interior Department's general nomenclature for years before (discussed above), referred to the "opened" or "ceded portion" of the Cheyenne River Reservation. *E. g.*, Order of Restoration of June 12, 1941, 6 Fed. Reg. 3300, 7 Kappler 1438.

Amici counties argue that official maps show the disestablishment of the opened portion of the Cheyenne River Indian Reservation. *See* Amici Counties' Br. 47. This is incorrect. Three of the large-scale maps they have lodged with the Court set out the original boundaries of the reservation, and the entire area is clearly stated to be the Cheyenne River Indian Reservation.

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[28] In statutes restoring land, Congress used similar terms. For example, the Act of May 19, 1958, 72 Stat. 121, restored land to the Klamath River Reservation, in California, and said that the lands restored "are hereby added to and made a part of the existing reservation for such tribe or tribes." Later, this Court held that that reservation had not been terminated. Mattz v. Arnett, *supra*.

C. Subsequent Court Actions

The State claims that since 1908, state courts have consistently asserted jurisdiction over the opened portion of the Cheyenne River Reservation and the federal courts have acquiesced in state jurisdiction. State's Br. 53-59. This claim will not withstand analysis.

Initially, it is remarkable that this claim is made despite the absence of *any* reported case in which an Indian was prosecuted by the State prior to 1963. *See* State's Br. 54. Also, occasional state prosecutions for offenses occurring on the opened lands proves little if anything about Cheyenne River Reservation boundaries, since the State claimed jurisdiction concurrent with the federal courts over all Indian reservations for much of the relevant period. *See* part C 1 below. The history of federal jurisdiction, though not consistent, tends to support the continued reservation status for the opened lands. Only the tribal court, which has historically defined its jurisdiction over tribal members by the reservation boundaries, has consistently exercised jurisdiction over the opened lands since 1908 on the assumption that the reservation boundaries had not been altered. As a result, the jurisdictional history of the opened lands strongly supports reservation status of those lands. *DeCoteau*, 420 U. S. at 442-43.

1. State courts

As discussed further below (at pages 43-45), in 1901 the State passed a statute giving the United States jurisdiction over any "person committing seven named crimes "upon" any Indian reservation in the State. Sess. Laws S. D. 1901 c. 106; Rev. C. S. D. (1903), Pol. C. § 8. In

1929, the South Dakota Legislature amended the 1901 statute by adding the following:

> ". . . But whenever any of said acts committed by any person upon an Indian reservation within this state shall constitute a crime under any law of the state of South Dakota, concurrent jurisdiction is hereby expressly reserved to the State of South Dakota to arrest, prosecute, convict and punish any person committing any offense under the Laws of the State of South Dakota even though the acts constituting such offense may also constitute an offense under the laws of the United States of America."

Ch. 158, Session Laws of South Dakota, 1929.[29] This assertion of concurrent jurisdiction remains in force, now found at S. D. Codified Laws, § 23A-16-1 (1979). *See State v. Shoemaker*, 39 N. W. 2d 524 (S. D. 1949).[30] Simply stated, South Dakota has claimed concurrent criminal jurisdiction over crimes committed by any person upon an Indian reservation since 1929. That the State may at times have prosecuted Indians for crimes occurring on any part of the reservation says nothing, then, about reservation boundaries.

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[29]In 1940, the South Dakota Attorney General expressed the view that the 1929 amendment was not valid. *See* Biennial Report of the Attorney General 1939/1940, p. 505. The 1929 statute was nonetheless re-enacted three times after the issuance of that opinion. *See* S.L. 1951, Ch. 187; SDCL, 1967 23-9-6; SL 1978, Ch. 178, § 220.

[30]Section 23A-16-1 reads in full: "Whenever any acts in violation of the penal laws of the United States committed by any person upon any Indian reservation within this state shall constitute a crime under any law of the state of South Dakota, concurrent jurisdiction is hereby expressly reserved to the state of South Dakota to arrest, prosecute, convict and punish any person committing any offense under the laws of the state of South Dakota, even though the acts constituting such offense may also constitute any offense under the laws of the United States."

2. Federal courts

There have been at least two prosecutions in federal court which indicate an assumption on the part of the federal court and prosecutor that the opened lands remained part of Cheyenne River Reservation. In 1926, one "James Mound. Indian" was successfully prosecuted in federal court in South Dakota for larceny "on Cheyenne River Indian Reservation." The Superintendent's report to the area office on the offense shows the locus of the crime as within the opened portion of the reservation.[31] A second larceny was committed by Pete Useful Heart in 1933 on the Cheyenne River Reservation. The report of this case says that Useful Heart stole a horse from the Chappell Bros. Co. land and sold it to Ward Phlegly on sec. 17, T. 16, R. 29. The latter location is in the opened area. At the time the Chappel Bros. Co. leased lands in both the opened and closed portion of the reservation. 1930 Grazing Report, 63145-1930-Cheyenne River File No. 301, National Archives. The failure of the case report to specify which leased lands indicates that the locus (*i. e.*, on the opened or closed portion of the reservation) was not thought relevant for federal jurisdiction.

The exercise of federal court jurisdiction over the opened Cheyenne River lands was not consistent, however. In *United States v. La Plant*, 200 F. 92 (D. S. D. 1911), a non-Indian was indicted for homicide of a non-Indian victim occurring on lands within the Cheyenne River

[31]The Superintendent's report stated that the crime occurred in Sec. 29, T. 16 R. 28 W., Dewey County, and did not apparently consider it necessary to state whether the offense occurred on the opened or closed portion of the reservation. See Appendix 96 of the Hoxie Report, *supra* n. 1, found in Volume VII of the record transmitted from the Court of Appeals. The cited section is within the opened part of the reservation, as maps lodged with the Court show.

Reservation to which a fee patent had been granted under the 1908 Act. The district court dismissed the indictment for want of federal jurisdiction, concluding that federal jurisdiction had lapsed when the Indian title to the land where the offense occurred had been extinguished. *Id.* at 93. However, a careful examination of the governing laws and decisions of this Court shows that the *La Plant* court applied the wrong legal standard, an error which undermines its application to the instant controversy.

The principal statute then governing criminal jurisdiction over Indian defendants on reservations was the Indian Major Crimes Act, 23 Stat. 385 § 9 (1885). It applied "within the limits of any Indian reservation," and the words "Indian country" did not appear in the statute. This raised the question whether it was subject to the rule of *Bates v. Clark, supra* page 24, that federal jurisdiction lapsed as Indian title was extinguished. In *United States v. Thomas,* 151 U.S. 577 (1894), the Court sustained federal jurisdiction over homicide by an Indian occurring on state school land within a reservation, land to which the Indian title had been extinguished. In other words, this law looked to reservation boundaries, not to Indian title, for its application.

The Indian Major Crimes Act applied only to Indian defendants. There was normally no federal jurisdiction over non-Indians committing crimes against non-Indians on Indian reservations. *United States v. McBratney,* 104 U.S. 621 (1882). *La Plant* would normally have been a state court case regardless of reservation boundaries.

But peculiar laws were then in force in South Dakota. In 1901, the State adopted a statute giving the United States jurisdiction over any "person" committing one of

the seven crimes then listed in the Indian Major Crimes Act if committed "upon" an Indian reservation in the State. Sess. Laws S. D. 1901 c. 106; Rev. C. S. D. (1903), Pol. C. § 8. In 1903, Congress asserted federal jurisdiction over these seven crimes "within the limits" of any Indian reservation in South Dakota. 32 Stat. 793 (1903) (repealed 1948).

Because the 1903 federal act used the same term of place as the Indian Major Crimes Act, the same scope of application might have been expected, relying on *United States v. Thomas, supra.* But the Eighth Circuit in a dictum ignored *Thomas* and applied the title-bound rule of *Bates v. Clark* to the 1903 Act. In *Hollister v. United States,* 145 F. 773, 777 (8th Cir. 1906), the court said:

> The Act of February 23, 1903 [32 Stat. 793], ex vi termini, became inoperative so far as any particular reservation was concerned upon the extinguishment of the Indian title. *Bates v. Clark,* 95 U. S. 204, 208. . . .

Hollister also involved an offense by a non-Indian against a non-Indian.

In 1909, this Court reconfirmed that the Indian Major Crimes Act depended on reservation boundaries and not on Indian title. *United States v. Celestine,* 215 U. S. 278, 285 (1909), was a prosecution of an Indian for homicide, and the Court said:

> But the word "reservation" has a different meaning, for while the body of land described in the section quoted as "Indian country" was a reservation, yet a reservation is not necessarily "Indian country" . . . when Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress.[32]

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[32]Compare the discussion of the Indian country liquor laws above at pages 22-26.

These were the relevant precedents in 1911 when *La Plant* was decided. But the *La Plant* court took no notice of this Court's decisions in *Thomas* and *Celestine*. It relied entirely on the contrary dictum of the Eighth Circuit in *Hollister*, quoting verbatim the passage from *Hollister* set out above. 200 F. at 93. The court construed the phrase "thus diminished" in the 1908 Act to mean diminished by the extinguishment of Indian title. *Id.* at 94. (This is further evidence that the contemporary understanding of that phrase was in terms of tribal title, not boundaries; see pages 20-22 above.) The entire discussion was in title terms, and jurisdiction was denied based on extinguishment of title to the parcel at issue.[33]

The fact that *La Plant* and *Hollister* did not involve Indians makes them peculiar cases. Federal Indian jurisdiction within the States has generally been tied to matters directly affecting Indians, and this Court has at times construed laws to restrict federal jurisdiction over Indian reservations when only non-Indians were involved. For example, in *United States v. McBratney, supra*, the Court held, notwithstanding the apparently plain language of a statute granting jurisdiction, that there was no federal jurisdiction over a reservation crime involving only non-Indians. *See also Draper v. United States*, 164 U.S. 240 (1896). Similarly, the Court has restricted tribal jurisdiction over non-Indians on reservations. *Montana v. United States, supra; Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978). The very restrictive interpretation of federal jurisdiction in *La Plant* and *Hollister* thus fits a traditional pattern of decision in cases where Indians are not directly involved.

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[33] *La Plant* was followed without analysis to sustain the conviction of another non-Indian defendant accused of homicide on Cheyenne River land fee patented under the 1908 Act. State v. Sauter, 48 S. D. 409, 205 N. W. 25, 28 (1925).

3. Tribal courts

In contrast to the ambiguous record of state and federal jurisdiction over the opened lands, the history of tribal jurisdiction is clear and consistent. The geographic extent of tribal authority to govern its members is generally defined by reference to reservation boundaries, not tied to land owned by the tribe.[34] The Cheyenne River Tribe has consistently exercised that authority over its members on the opened portion of the reservation from 1908 to the present time.

In 1911, The Cheyenne River Agency Superintendent summarized tribal court and police activity on the reservation in response to an inquiry from the Commissioner's office. At that time, there were five police officers, 18 police privates, and four tribal judges.

> The police are expected to cover the entire reservation, both the diminished portion and the portion thrown open to settlement. . . . The reservation is not divided into police jurisdictions; instead, there are four districts, namely, Agency, White Horse, Thunder Butte and Cherry Creek. [Thunder Butte was in the opened part of the reservation]. The Agency District has six police privates and one officer; White Horse and Thunder Butte and Cherry Creek Districts each have four privates and one officer, and there is one police officer at large having charge of all the police work. . . . Four courts of Indian offenses are maintained—one at the Agency and one at each of the three subagencies, each court being presided over by an Indian judge. Approximately 600 cases are tried during the

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[34]See Buster v. Wright, 135 F. 947, 951-52 (8th Cir. 1905), *appeal dismissed*, 203 U. S. 599 (1906); W. Hagen, Indian Police and Judges (1966). *See also* 25 C. F. R. § 11.2(a) (1983), defining the jurisdiction of Courts of Indian Offenses. This provision is unchanged since its original adoption in 1935.

> year, in which number probably 400 convictions are returned. The sentences rendered impose fines ranging from $5.00 to $25.00 and imprisonment in the Agency or sub-agency guardhouse for some 30 to 90 days.[35]

The record in the *Dupris* case shows that the same tribal court system prevailed well into the 1920's with the explicit approval of the Indian Department. *See* Hoxie Report, *supra* n. 1, Chap. V.

After the passage of the Indian Reorganization Act of 1934, 48 Stat. 984 (codified at 25 U. S. C. § 476), the Cheyenne River Tribe revamped its tribal government, including its Courts system. The Code of Offenses of the Cheyenne River Sioux Tribal Court, adopted by the tribe on October 6, 1937 and approved by the Bureau of Indian Affairs Agency Superintendent on October 8, 1937, provided in pertinent part:

> The Cheyenne River Sioux Tribal Court of the Cheyenne River Indian Reservation shall have jurisdiction over all offenses when committed by any member of the Cheyenne River Sioux Tribe on the reservation and any person consenting to jurisdiction as hereinafter provided. . . .
>
> The Cheyenne River Reservation shall be taken to include all territory within the original reservation boundaries. . . .

Exhibit 1, attached to testimony of Cheyenne River Sioux Tribe at Hearing before a Subcommittee on Indian Affairs, United States Senate, 76th Cong., 2d Sess., pt. 37,

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[35]Thomas J. King to Commissioner, Aug. 25, 1911, Response to Circular # 554, National Archives Record Group 75, Appendix 76 to Hoxie Report, *supra* n. 1, Vol. VI of the record herein transmitted from the Court of Appeals.

pp. 21619-23 (1939). All subsequent amendments of the tribal laws are consistent.

The only clear pattern, then, that emerges from the jurisdictional history of the opened Cheyenne River lands is the consistent exercise of tribal court jurisdiction over those lands. Because the Cheyenne River Tribe has always defined its court's jurisdiction by reference to the reservation boundaries, the jurisdictional history of that court reflects the tribe's understanding that the reservation boundaries were not altered in 1908. That the Indian Department consistently approved of the tribal court's activity shows that it viewed tribal regulation of internal matters over those lands—a fundamental attribute of an Indian reservation—as appropriate. *See United States v. Wheeler*, 434 U. S. 313, 322-26 (1978); *Fisher v. District Court*, 424 U. S. 382 (1976). Particularly when compared with the ambiguous state authority asserted over the opened lands, the longstanding history of tribal court jurisdiction has created justifiable expectations among the Cheyenne River people that the tribe's inherent authority to regulate internal concerns extends to those lands. *Cf. Rosebud*, 430 U. S. at 605-06.

CONCLUSION

For the reasons stated, the Court should affirm the judgment of the Court of Appeals and sustain the District Court's grant of a writ of habeas corpus to John Bartlett.

Respectfully submitted,

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